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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1156

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS,
ET AL.,
Respondents.

On Writ of Certiorari To The United States
Court of Appeals For The
Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) submits this brief as amicus curiae urging affirmance due to the substantial harm reversal of the decision below may have upon the regulation

of public utilities by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioner and the Respondents, which have been filed separately with the Clerk.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands engaged in the regulation of utilities and carriers. The Council of the City of New Orleans, Respondent herein, is an Associate Member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains State and local officials charged with the duty of regulating natural gas, electric and

communications utility companies operating within their respective jurisdictions. As such, these officials have the obligation to assure the establishment and operation of utility companies which serve the public interest. This means that State and local regulators must, under law, seek to ensure that dependable and safe utility service is provided consumers at rates which are just, reasonable and nondiscriminatory.

In the decision herein under review, the United States Court of Appeals for the Fifth Circuit affirmed a decision of the United States District Court, Eastern District of Louisiana, rejecting Petitioner's claim that the Council of the City of New Orleans' ("City Council" or "Council") decision fixing the retail rates it may charge its customers was preempted by earlier decisions of the Federal Energy Regulatory Commission (FERC or the

Commission).[1] Petitioner New Orleans Public Service Inc. (NOPSI), a utility selling electricity to retail consumers in the City of New Orleans, has appealed the Fifth Circuit's decision to this Court on the ground that the court below erred by rejecting NOPSI's argument that a Federal Energy Regulatory Commission (FERC) ratemaking order applicable to a wholesale sale or allocation of electricity preempts a State or local commission decision that the power acquired by the retail utility pursuant to that order should have been resold is facially preempted. Specifically, NOPSI contends that the City Council's

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[1] The decision of the Fifth Circuit appears at pages 2A-24A of the Appendix to the Petition for Writ of Certiorari, and, as revised by the Court of Appeals on February 8, 1991, appears at pages 11-33 of the Joint Appendix. This decision has been reported at 911 F.2d 993. The decision of the District Court, which is unreported, appears at pages 26A-32A of the Appendix of the Petition for Writ of Certiorari. Subsequent reference will be made to these decisions as they appear therein in this form: Cert. App. at ___, or J.A. at ___.

decision finding the utility imprudent for failing to resell wholesale power generated by the Grand Gulf nuclear power station and allocated to it by FERC is beyond the City Council's jurisdiction under this Court's decisions in Nantahala,[2] Mississippi Power & Light,[3] and a recent decision involving the same parties, NOPSI III.[4] The Council's order in no way questions the FERC allocation of power to NOPSI, or the FERC-set rate, but rather sets retail rates based on off-setting revenues that NOPSI said it could obtain, but did not, through off-system sales.

If adopted by this Court, Petitioner's

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[2] Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

[3] Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988).

[4] New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350 (1989). This case is known as NOPSI III due to earlier litigation involving these parties.

argument would substantially and seriously disrupt State regulatory systems in an area of State concern recognized by the Court in its past decisions as a vital interest: State regulation of the retail rates and services of electric utilities. Reversal of the Fifth Circuit's decision could greatly restrict the ability of State and local regulatory commissions to ensure that retail utilities which are operating affiliates of public utility holding companies operate in an efficient manner and do not force their ratepayers to bear the risks of negligent or imprudent utility decisionmaking. The protection of State and local jurisdiction in these circumstances is especially important at this time -- a period in which this vital industry is undergoing profound structural and regulatory reform as a result of the implementation of procompetitive State and Federal policies. Accordingly, the NARUC's interest in addressing the

impact of Petitioner's arguments on the jurisdiction, practices and procedures of its member commissions is strong, compelling its participation in this case.

SUMMARY OF ARGUMENT

In their respective arguments to this Court, both NOPSI and the United States and FERC, as joint amici in support of NOPSI, assert that there can be no State or local regulation which affects the recovery in retail rates of the costs of the Grand Gulf plant, essentially because FERC's exclusive jurisdiction over wholesale rates leaves nothing to be regulated at the retail level. Rather, so the argument goes, the City Council, and other similarly situated State and local regulatory bodies, must mechanically pass through wholesale power costs in retail rates, even if they have determined that the retail utility assigned

these costs could have accepted its allocated share, but taken actions to reduce the exposure of its ratepayers to the economic distress and dislocation these costs will cause. Not only are retail regulatory bodies bound by FERC's determination of the level and allocation of the costs of wholesale power, they are also apparently without jurisdiction to take any action whatsoever that would affect the retail utility's recovery of these costs in its rates to the residential, commercial and industrial consumers it is privileged to exclusively serve under the protection of State and local franchise statutes and regulations -- even where, as here, neither the allocation nor the FERC-set wholesale rate are disturbed or even questioned.

In point of fact, in making these arguments, NOPSI and its supporters seek this Court's affirmance of a regulatory regime that would force State and local

commissions to charge retail ratepayers for supply options that are not necessarily the least costly available to meet ratepayer demands for power, even if other options are available that are equally consistent with the FERC's wholesale rate and allocation order. In essence, their argument for facial preemption is that the mere issuance of an FERC wholesale rate or allocation order, at least in the context of a public utility holding company system, automatically requires State and local regulators to permit the dollar-for-dollar recovery of the costs assigned by the FERC order from retail ratepayers, even if the retail utility's actions or inactions were demonstrably imprudent or negligent. In other words, the mere existence of a FERC order forecloses any State or local retail ratemaking determination which reduces retail rates below the levels that would result from an automatic passthrough of

these wholesale costs.

In its decision in NOPSI III, however, the Supreme Court rejected Petitioner's arguments that the City Council's ruling at issue in this case was "facially preempted" by the FERC's exercise of jurisdiction over the wholesale rate impact of the Grand Gulf power plant. 491 U.S. at 367. Indeed, this Court remanded this very case for the purpose of conducting a "factual inquiry" into the City Council's decisionmaking process. If, as NOPSI and its supporters apparently believe, there were no independent State or local jurisdiction to engage in such decisionmaking, the Court's remand would clearly have been unnecessary, since there would have been no facts worth finding.

Despite the remand, however, there are no new facts. This case comes to this Court in the same posture as NOPSI III, with the additional weight of the decisions of the

District Court and Court of Appeals which found that the City Council acted within its lawful jurisdiction. Petitioner's rejected claim of "facial preemption" embedded in the NOPSI III abstention litigation -- that FERC and only FERC can determine the ultimate recovery of Grand Gulf costs from NOPSI's retail ratepayers -- differs in no material respect from its claim in this case.

Throughout their briefs, NOPSI and its supporters trumpet the need for a "neutral forum" to decide power supply, pricing, and allocation issues affecting two or more States. Clearly, the Commission is authorized to play such a role, but the argument has no application here because the decision here does not affect two or more States, nor does it shift costs to other States. However, it is not the case that FERC's jurisdiction to regulate wholesale power sales, including the establishment of a "filed rate," serves to preempt or

otherwise foreclose the ability of State and local commissions to reach reasoned decisions concerning local utility decisions which underlie the rates and their effects upon retail utility consumers. Moreover, this alleged "neutrality," which is not at issue here, cannot serve to expand FERC's jurisdiction beyond that authorized by Congress, which is precisely the result NOPSI and the Government seek here.

ARGUMENT

As this Court recognized in NOPSI III, the City Council "has a substantial, legitimate interest in regulating intrastate retail rates." NOPSI III, supra, 491 U.S. at 365. Indeed, there the Court noted that NOPSI, once again the Petitioner in this case, did not deny "that the State has an interest affirmatively protected by federal law in conducting proceedings to set intrastate retail rates." Id. at 366. This

statement is entirely consistent with statements in the Court's earlier decisions that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983). Indeed, the Court has recently reaffirmed the constitutional principle that in discharging this "important function," State and local regulators have broad authority to "decide what rate-setting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989). Therein, the Court observed that retail ratemaking is a difficult undertaking, requiring the consideration of a multitude of factors: "The economic judgments required in rate proceedings are often hopelessly complex and

do not admit of a single correct result." Id. at 314.

The issue in this case is whether, when making these "complex economic judgments," State and local regulatory commissions are precluded from discharging their "most important function" merely because the FERC has allocated wholesale power costs to the local utility. Petitioner and its supporters contend that wholesale power costs assigned a retail subsidiary by the FERC must be automatically recovered dollar-for-dollar from retail ratepayers even when it has been shown that the retail subsidiary failed to take actions to reduce the impact of those costs on its consumers without upsetting the allocation and without intercompany consequences. The NARUC respectfully submits that despite FERC's supervision of wholesale power sales, this Court must find that State and local regulators retain their historic

jurisdiction "affirmatively protected by federal law. . .to set intrastate retail rates." 491 U.S. at 366.

THE CITY COUNCIL'S JURISDICTION TO HOLD NOPSI ACCOUNTABLE FOR ITS FAILURE TO REDUCE THE RISK OF GRAND GULF POWER IS NOT PREEMPTED

In reviewing NOPSI's facial preemption claim, this Court does not write on a clean slate. In NOPSI III, the Court found no "facial preemption" of the City Council's jurisdiction over the passthrough of NOPSI's share of the costs of the Grand Gulf plant:

> The Council has not sought directly to regulate interstate wholesale rates; nor has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; nor has it examined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the normal ratemaking step of making NOPSI's shareholders rather than the ratepayers bear the consequences. Nothing in this is directly or even

> indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.
>
> NOPSI III, 491 U.S. at 367 (emphasis added)

The issue underlying the City Council's review of NOPSI's retail rates was the "normal" regulatory inquiry as to whether the utility had the obligation to take actions to sell power, once assigned it by the FERC, in order to discharge the responsibility it had to deal with the growing risks of the project at the time options were available to reduce those risks. However, NOPSI[5] and the United

[5] According to NOPSI, the only role State and local regulatory commissions may play in cases such as this is to assert their rights as litigants in FERC proceedings under section 205 of the Federal Power Act. Once those proceedings are complete, including subsequent judicial review of the FERC rate order, then the retail regulators are allegedly bound with respect to retail cost passthrough issues. Pet. Br. at 24-28. Of course, under such a regime, retail regulators, exercising one of "the most important of the functions traditionally associated with the police power of the States" (Arkansas Electric, supra, 461 U.S. at 377), become just one more litigant with no greater standing than the retail utility companies they are charged to regulate.

States[6] have framed the issue as whether State and local regulators have any jurisdiction to take any action with respect to a FERC wholesale allocation other than simply passthrough the costs in retail rates. Relying on MP&L, these parties assert that the Council is unquestionably foreclosed from determining this question, and further, that the Fifth Circuit's finding, relying on this Court's conclusions in NOPSI III, that not all elements of the utility's behavior were beyond the City Council's purview is erroneous.

[6] According to the United States and the FERC, there is no set of regulatory findings or circumstances that would enable a retail regulatory commission to affect the recovery in retail rates of wholesale power costs pursuant to a FERC-approved allocation. Govt. Br. at 13-16. "Just as FERC had exclusive jurisdiction to consider the contention that MP&L acted imprudently, it also had exclusive jurisdiction to consider the Council's prudence theory." Id. at 15.

Contrary to these claims, the Fifth Circuit's decision faithfully reflected this Court's opinion in NOPSI III, finding that under MP&L "there were several things the Council was not entitled to do in the prudence inquiry." J.A. at 23. The court below then engaged in searching inquiry of "exactly what the Council did," and relied on this Court's "characterization" of the Council's actions in NOPSI III, supra at 14-15, to conclude that the Council's order "is not facially preempted." J.A. at 24-26.[7]

NOPSI finds the Fifth Circuit's reliance on this Court's NOPSI III

[7] The Fifth Circuit found that the Council had not strayed into forbidden territory by questioning NOPSI's decision to participate in Grand Gulf, or challenging FERC's determination of the price or allocative shares of the Grand Gulf power. J.A. at 23-24. Rather, the court below found that the Council had acted in an area that FERC had not addressed -- NOPSI's behavior as wholesale purchaser and potential reseller "once the Grand Gulf project was underway." Id. at 25. Again, relying on NOPSI III, the Court of Appeals correctly found no facial preemption under this line of reasoning.

"characterization" to be "inexplicable," and further asserts that the meaning of NOPSI III is so mysterious that "only this Court can know what it meant in this passage from NOPSI III." Pet. Br. at 36. With all due respect, the Court's statement in NOPSI III, 491 U.S. at 367, that "[n]othing [in the Council's order] is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it" is both pellucid and sensible.[8] It means that the City

[8] It is NOPSI's argument that FERC's "orders" facially preempt the City Council that is inexplicable. Pet. Br. at 36 (emphasis in original). Throughout its brief, NOPSI argues that once FERC issued its wholesale decisions, the City Council had no jurisdiction to take any action which denied or interfered with its right to passthrough the Grand Gulf costs. If this is true, the nature or content of the FERC "orders" defining or allocating those wholesale costs is irrelevant. Their mere existence is enough to foreclose retail regulatory authority. Clearly, this Court knew that these orders existed, but characterized the City Council's actions in NOPSI III in terms of the preemptive effects of the law, i.e. the statute, regulations and case law which define the respective

Council's action in finding NOPSI imprudent for its failure "to diversify its supply portfolio," if supported by evidence, is not preempted by the Federal Power Act, the FERC's regulations, or administrative and judicial decisions interpreting federal law. More importantly, this statement must mean that there are legitimate areas in which retail regulatory commissions can lawfully exercise their jurisdiction, even in the case of wholesale power acquisition by a retail affiliate of a holding company. Stated differently, the Court's statement in NOPSI III means that both NOPSI and the United States are wrong in asserting that retail regulators must in every case establish a retail rate that is the equivalent of a dollar-for-dollar recovery of FERC-regulated wholesale power costs in retail rates, even if there are legitimate offsets to be considered.

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roles of State and Federal regulators.

A. Filed Rates

Accordingly, NOPSI and the United States' reliance on the "filed rate doctrine"[9] and the issue of "trapped costs"[10] as grounds for federal preemption of the Council's jurisdiction is unavailing. With respect to the "filed rate doctrine", there has been no showing, nor could there be, that the Council has interfered with NOPSI's obligation to pay for its share of Grand Gulf power at the FERC-determined rate.[11] As a practical matter, the "filed

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[9] Pet. Br. at 29-30.

[10] Govt. Br. at 14-15.

[11] The United States admits as much: "...the Council's prudence order does not relieve NOPSI of the duty to pay for power it draws from the MSU system at the rates prescribed by FERC's order." Govt. Br. at 21. Contrary to the Government's conclusion, the fact that the "filed rate" remains intact distinguishes this case from MP&L, wherein the Mississippi Supreme Court's decision constituted, in the view of the Fifth Circuit, a finding "on MP&L's purported imprudence in deciding to participate in Grand Gulf in the first place," an issue of federal jurisdiction. J.A. at 23. Here, the Council has assessed

rate" argument confuses two related, but separate issues. Under the filed rate doctrine, NOPSI is obligated to pay for Grand Gulf power, both as to price and quantity, as FERC's rulings require. In essence, NOPSI is bound in a quasi-contractual sense to its obligation to purchase and pay.

What NOPSI does or does not do with the Grand Gulf power once purchased is an entirely different issue, one step removed from its wholesale purchase obligation, for which the FERC-determined filed rate is immaterial. NOPSI denies any such distinction, relying on this Court's decision in Nantahala, supra, for the proposition that FERC-established wholesale rate levels "must be given binding effect by

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no imprudence remedy on similar grounds, and has assumed that the "filed rate" must stand. The issue here is whether NOPSI was negligent in failing to resell, irrespective of its obligation to purchase Grand Gulf power.

state utility commissions determining intrastate rates."[12] As a matter of logic, NOPSI's argument appears to be that once the federal agency establishes a rate and a quantity of power to be purchased, any subsequent action by the purchasing utility, as directed or regulated by its retail regulator, to resell the power or service acquired is preempted, even if the utility continues to purchase at the filed rate.

In practice, Petitioner's "filed rate" argument would effectively insulate utility purchasers of regulated goods and services from any obligation to manage their businesses prudently. It is entirely inconsistent with the history of management of the Middle South System, where the retail utilities have been bought and sold power sources through the exercise of prudent management responsibilities. Petitioner's

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12 Pet. Br. at 29, citing Nantahala, 476 U.S. at 966.

sweeping argument would do more to insulate their managers from their public responsibility than any claim previously advanced by any public utility holding company. In short, this argument would become a jurisdictional shield to protect management from its ongoing need and obligation to act prudently.

Clearly, this Court's ruling in Nantahala that States may not find FERC-approved rate levels to be unreasonable, 476 U.S. at 966, cannot bear the weight that NOPSI gives it. Logically and practically, NOPSI's acquisition of bulk power supplies under a FERC-regulated regime, and its subsequent actions at the retail level are distinct issues which the Fifth Circuit quite properly held were within the City Council's jurisdiction. J.A. at 24-26.

B. Trapped Costs

NOPSI's reliance on "trapped costs" also proves too much, as does the United States' argument that the City Council is "foreclosed" from disallowing FERC-approved costs in retail rates. Pet. Br. at 29; Govt. Br. at 14-15. These arguments devolve to the point that the City Council, or any other retail regulatory body exercising jurisdiction over a holding company affiliate, apparently may take no action which inhibits or limits a retail operating subsidiary's ability to charge rates that reflect its FERC-assigned payments in retail rates, even if there are legitimate offsets. In other words, FERC-approved wholesale rates become inviolable retail costs for which the State commissions must guarantee recovery, despite findings that the retail utility could have reduced those costs, and that its management was negligent (or worse)

in not doing so.[13]

The "trapped cost" argument confuses the distinct State and Federal roles that the Court in NOPSI III recognized. As the Fifth Circuit found, the City Council has

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[13] Taken to its logical extreme, NOPSI and the Government's arguments appear to create an affirmative obligation on the part of retail regulators to assist the retail utility in recovering wholesale costs which may otherwise render its retail service uneconomic. Consider the following hypothetical: Neither NOPSI or the United States question the City Council's jurisdiction to allocate wholesale costs assigned it by FERC to its respective classes of retail consumers (residential, commercial and industrial ratepayers), by designing rates which recover NOPSI's cost of service. It is entirely possible that under NOPSI's preexisting rate design, the high costs of Grand Gulf power that would normally be allocated to the industrial class would cause some industrials to close their businesses or self-generate, thereby precluding NOPSI from recovering all of its Grand Gulf costs assigned such consumers. In such case, is the City Council bound to redesign NOPSI's retail rates by allocating Grand Gulf costs to the price-inelastic retail classes (e.g. residential) to ensure that no wholesale costs are "trapped?" The logic of NOPSI's and the Government's arguments would create such an obligation on the part of the City Council, or even more perniciously, would lead to FERC's involvement in retail rate design issues as well.

not questioned or sought to regulate NOPSI's wholesale power costs. J.A. at 23. The Council has simply made "the normal ratemaking step of making NOPSI's shareholders rather than ratepayers bear the consequences" of the utility's imprudent actions. NOPSI III, supra, 491 U.S. at 367.[14]

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[14] Despite its participation in the Government's brief, the FERC at one time well understood the distinction between a utility's paying a regulated price and its ability to charge a lawful and reasonable rate. See, Ohio Power Co. v. FERC, 880 F.2d 1400 (D.C. Cir.), rev. sub nom. Arcadia v. Ohio Power Co., 498 U.S. ___, 112 L.Ed.2d 374 (1990). In this litigation, the Commission took the "normal ratemaking step" by seeking to deny Ohio Power the right to recover in its wholesale rates the costs of "captive coal" (i.e. coal produced by a company affiliated with the purchasing utility) also subject to the regulatory authority of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. Before the Court of Appeals, the Commission claimed its decision to deny Ohio Power the right to dollar-for-dollar recovery in the utility's wholesale rates of coal costs regulated by the SEC had not "trapped costs". 880 F.2d at 1409-10. In Arcadia, which reversed the Court of Appeals' decision on other grounds, this Court expressed no opinion on the "trapped cost" issue and remanded for further

C. NOPSI's Obligation to Purchase and Not Resell Its Grand Gulf Power

In footnote 43 of its Brief, NOPSI finally alludes to the real issue that lies at the heart of this case: whether FERC's jurisdiction to determine wholesale rates and allocate costs among the retail operating affiliates of a public utility holding company system confers a federal right on the part of the retailers to refuse to resell wholesale power so allocated. NOPSI states that its "facial preemption claim here rests on the valid FERC orders that require NOPSI to buy 17% of Grand Gulf at FERC-approved rates." Pet. Br. at 36, n. 43 (emphasis in original). Left unsaid is NOPSI's apparent conclusion that these FERC orders serve to confer upon it the right to refuse to resell power that it should prudently sell, and be held harmless for that failure.

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proceedings. 112 L.Ed.2d at 387.

In fact, the entire thrust of NOPSI's case, supported by the United States, is that a FERC wholesale rate determination clothes a retail utility in NOPSI's position with an absolute immunity from any retail rate order which fails to provide the utility the right to bill its ratepayers for its purchased power costs. As discussed supra at n. 13, this "right not to resell" argument provides utilities such as NOPSI with the ability to sit on their hands and demand that its retail regulators ensure that all actions are taken which insulate the company from all market risks that the wholesale allocation may cause.[15] Clearly, under any reading of this Court's

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[15] It also apparently gives a utility the right to mislead its retail regulatory commissions. In this case, NOPSI executives testified before the City Council that the utility could and would resell Grand Gulf power if appropriate. J.A. 142-43. Of course, now NOPSI asserts that despite these earlier representations, it enjoys the equivalent of an absolute federal right not to resell, or be penalized for its failure to do so.

NOPSI III characterization of the Council's regulatory response to the passthrough of the costs of Grand Gulf, utilities such as NOPSI are not provided with blanket protection from their retail regulatory commission's responsibility to ensure reasonable and economical utility service.[16]

It is important for the Court to understand the relative roles that FERC and the State and local commissions play with respect to the regulation of retail utilities, even in the case of operating subsidiaries of public utility holding companies. Nationwide, the vast majority of utility investment is carried as retail

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16 We agree that this case does not involve any claim that NOPSI could avoid taking its share of Grand Gulf power and costs. Clearly, under the FERC allocation order, NOPSI has no choice but to accept and pay for its share of Grand Gulf capacity. Accordingly, so-called Pike County issues do not arise in this case. Pike County Light & Power Co. v. Pennsylvania Public Utility Commission, 465 A.2d 735 (1983).

assets subject to the jurisdiction of State and local commissions. By contrast, FERC's regulatory jurisdiction is expressly limited by the provisions of the Federal Power Act to specifically exclude generation facilities, and by omission, any activities that utilities conduct on the "demand side" of the retail meter.[17]

Stated differently, even the retail affiliates of holding companies maintain substantial assets subject to retail rate regulation, conduct or fail to conduct programs to promote their customers' efficient use of electric power, and allocate a utility's costs of service among

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17 It is principally the States that assess a retail utility's need for, and the prudence of, power supply transactions, whether they be construction of plant for "retail rate base" or wholesale purchases from off-system. Tierney, Pre-Approval of Resources: A New Direction for Regulation in Massachusetts, Electricity Journal 26 (Dec. 1990). Thus, NOPSI's assertion that "FERC alone determines the reasonableness of bulk power supply arrangements" (NOPSI Br. at 29) is, at best, uninformed.

various customer classes.[18] Indeed, State and local regulatory commissions have begun a process of regulatory reform, dubbed least cost planning or integrated resource planning, with the goal of promoting utility consideration of all potential demand and supply-side options (including power purchased at wholesale) to develop a portfolio of sources which will result in the most economical level of service.

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18 See n. 14, supra, concerning rate design issues. State and local regulation of retail rate design is particularly important in the context of this case because it is directly analogous to the allocation decision that FERC made with respect to Grand Gulf output. Routinely, State regulatory bodies reach reasoned decisions which allocate retail costs to different ratepayers based on a host of factors. Such allocations may take into account the ability of the retail utility to recover some of its costs from nonjurisdictional customers, i.e. through off-system sales and resales of power. NOPSI and the Government's arguments obviously threaten State regulation of a utility's off-system sales decisions, but also, carried to their logical conclusion, raise substantial questions concerning interclass allocations at the retail level, particularly between price elastic and inelastic customers.

NOPSI's and the Government's arguments in this case run entirely counter to this growing trend, which ironically enough, was triggered in large measure by the adoption of pro-competitive Federal regulatory policies. At the end of its decision in Duquesne Light, supra, the Court alluded to impending changes in the structure of the electric utility industry which will inevitably affect regulation of retail rates and services. Beginning in 1978 with the passage of Section 210 of the Public Utility Regulatory Policies Act of 1978, codified at 16 U.S.C. sec. 824a-3 (1985)(PURPA), policies at both the Federal and State levels have begun to erode the monopoly characteristics of electric utility control of generating capacity.[19] PURPA reduced barriers to entry which had previously

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19 See Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 750-751 (1982) for a description of the deregulatory goals of PURPA.

prevented non-utility cogenerators and small power producers from selling power into electric distribution markets. In recent years, the FERC has proposed to reduce its wholesale regulation of so-called independent power producers--non-utility generators with no distribution facilities or retail customers.[20] This FERC initiative, which is pending at the Commission, reflects the development of new methods of regulation at the State level which seek to inject greater competition into generating markets. State commissions have begun to experiment with competitive bidding systems in which utilities conduct auctions to acquire access to third-party generating capacity for service to retail

[20] See Notice of Proposed Rulemaking, Regulations Governing Independent Power Producers, IV F.E.R.C. Stats. & Regs. para. 32,456, 53 Fed. Reg. 9327 (1988).

consumers.[21] Patterned on PURPA, these State bidding programs seek to encourage utilities to consider third-party producers in order to acquire incremental generating capacity at the lowest available cost.[22]

Necessarily, these complex new State initiatives will require a period of experimentation. Further, because many of these programs involve efforts to rely upon the growing number of competitors in wholesale power markets, new State resource acquisition plans can be expected to raise "federal issues", including questions involving the reasonableness of passing through the costs of bulk power purchases in retail rates.

Therefore, a great deal is a stake in

[21] See Notice of Proposed Rulemaking, Regulations Governing Bidding Programs, IV F.E.R.C. Stats. & Regs. para. 32,455, 53 Fed. Reg. 9324 (1988).

[22] See Griggs, Competitive Bidding and Independent Power Producers: Is Deregulation Coming to the Electric Utility Industry?, 9 Energy L.J. 415 (1988).

this case. NOPSI's argument -- that the Council cannot interfere with its apparent right to sit on the sidelines of the emerging market, to not make choices, and to not sell Grand Gulf power off-system -- directly contradicts the forces of competition and choice which are changing the nature of retail rate regulation. Because of its limited jurisdiction under the Federal Power Act, FERC is in no position to regulate these choices, or provide a utility with a shield to protect it from making such choices, beyond the Commission's responsibility to ensure that its wholesale pricing and transmission policies do not inhibit emerging competitive options for meeting the needs of retail consumers.[23] This Court must not sanction a

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[23] In its decision on remand from this Court's opinion in NOPSI III, the Fifth Circuit rejected NOPSI's claim that it had an obligation to examine "the Council members' motivation in making the order." J.A. 30. Quite properly, the Court below ruled that its examination of the "pretext"

system of concurrent State/Federal regulation which inhibits those choices as well.

In sum, the NARUC respectfully urges the Court to affirm the State's historic "substantial, legitimate interest in regulating retail rates,"[24] by rejecting Petitioner's sweeping arguments. The Court must preserve the lawful authority of State and local governments to ensure that retail

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claim "is inevitably a review of the sufficiency of the evidence to support the Council's stated reasons for denying the pass through," and accordingly, the Council's "motivation is not relevant." J.A. 30-31.

Before this Court, NOPSI and its supporters do not explicitly press the "pretext" claim. However, the NARUC respectfully urges the Court to firmly reject any suggestion that Federal courts be given a roving commission to review and judge the motives of State regulatory officials simply because wholesale power purchases are at issue. Clearly, in NOPSI III, this Court limited lower courts to such objective issues as "industry practice, wholesale rates, and power availability," and did not sanction an open-ended investigation of the thought processes of State and local officials. 491 U.S. at 363.

[24] NOPSI III, supra, 491 U.S. at 365.

utility rates and conditions of service are in the public interest.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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